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No. 440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

J. B. BEAN and 63 OTHERS, *Petitioners,*

v.

THE UNITED STATES, *Respondent.*

On Petition For A Writ of Certiorari to the United States Court of Claims

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

THEODORE ANDRESS
El Paso, Texas

THURMAN ARNOLD
Washington, D. C.

W. MORGAN HUNTER
Austin, Texas
Attorneys for Petitioners

Of Counsel:

ANDRESS, LIPSCOMB, PETICOLAS & FISK
ARNOLD, FORTAS & PORTER
POWELL, RAUHUT, McGINNIS & REAVLEY

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If, as insisted throughout the Brief in Opposition, plaintiffs have no rights as to water other than contract rights as third party beneficiaries of a municipal contract, obviously plaintiffs have no case for compensation for taking of real property rights, as claimed in their petition, and the Court need not be concerned as to whether they might have made out cases for breach of contract.

If, however, as plaintiffs assert, the plaintiffs were vested with appropriative rights to the use of water—vested rights of real property—acquired in conformity with State law—then the reclamation laws of the United States direct that such property rights be respected and followed by Federal officials,

existence of primary rights in the El Paso District to the extent available project waters are required for beneficial use on that District's land" (pp. 202-203, Motion for Summary Judgment).

Thereafter, Hudspeth and five individual landowners, as representatives of all landowners in the Hudspeth District, instituted suit against Bureau of Reclamation officials, several landowners in the El Paso District and the El Paso District itself (Pet. 4). They sought a declaratory judgment to establish their claimed water rights and an injunction against the federal officials from interfering with them. The district court granted the defendant's motion for summary judgment on the merits and dismissed the action. The court of appeals construed the Reclamation Act of 1902 and the Warren Act and ruled that the action was in fact a suit against the United States. Accordingly, it ordered dismissal for lack of jurisdiction. *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425 (C.A. 5), certiorari denied, 348 U.S. 833.

Following another unsuccessful effort by the Hudspeth District and others to obtain injunctive relief (*Miller, et al.* v. *Jennings, et al.*, 243 F.2d 157 (C.A. 5), certiorari denied, 355 U.S. 827, rehearing denied 355 U.S. 885), petitioners instituted this action in the Court of Claims against the United States to recover compensation under the Fifth Amendment for the taking of their alleged water rights (Pet. 5). Motion by the United States for summary judgment on the merits was granted by the court below and the petition was dismissed (Pet. App. 44). The court held

(Pet. App. 27-44) that petitioners acquired no rights under the notices of appropriation filed by the United States in 1906 and 1908 because they were for water to be used on lands in the project and petitioners' lands are outside the project. Accordingly, it ruled that petitioners' rights derive solely from the Warren Act contract with the Hudspeth District and, by its terms, their rights are inferior to the need on the project caused by "the severe drought in Texas" (Pet. App. 36).

ARGUMENT

In essence the petitioners base their claim on the beneficial use of water provided for their lands under a contract which is conditional in nature. It cannot be asserted that the condition was not authorized by the Warren Act. The petitioners merely claim that beneficial use under Texas water law and Section 8 of the Reclamation Act of 1902 gives them a right to continue to receive water regardless of the condition. Their contentions have been unanimously rejected by the three courts to which they have been presented. Thus, the Court of Claims in this case and both the United States District Court for the Western District of Texas and the Court of Appeals for the Fifth Circuit in *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425, 431, certiorari denied, 348 U.S. 833, have held that petitioners' rights to receive water outside the project derive exclusively from the Warren Act contract and the contract, as required by the Act, subjects petitioners to first rights in landowners within the project. There are no conflicting decisions. Petitioners' reference

(Pet. 21) to the large acreage irrigated under Warren Act contracts does not make the unsound argument on which they rely an important question warranting review by this Court.

Petitioners set forth at length the doctrine of prior appropriation in the western states and advert to Section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390, 43 U.S.C. 372, 383 (Pet. App. 23), as preserving state law relative to control, appropriation, and distribution of water used in federal irrigation projects. From that they reason that once they have beneficially used water received under their Warren Act contract they have established a vested right to it under state law. This attempt to graft state appropriative water rights to a conditional contract under the Warren Act must fail both because the state law is inapplicable to such contract rights and because, if applicable, it could not enlarge them.

Thus, notwithstanding their insistence upon the applicability of state law, petitioners' rights were subordinate to those of the project for which the water had earlier been appropriated. Indeed, the Hudspeth District, by its contract, expressly relinquished any

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In the words of this Court: "As we read Section 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. * * * We read nothing in Section 8 that compels the United States to deliver water on conditions imposed by the State." *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 291-292.

claims which its landowners might previously have had in any waters of the Rio Grande (Pet. App. 34, 35-36). The only rights they had to the waters received were bottomed on the Warren Act contract with the Hudspeth District. Petitioners plainly concede in the very statement of the question presented that all the waters involved were " * * * waters delivered under Warren Act contracts * * * " (Pet. 3). Thus, the petitioners have no claim under state law to the right they assert in the waters delivered.

The Rio Grande project has never included petitioners' lands. This was found to be the fact by the court below in the present case (Pet. App. 31-40) and also by the Fifth Circuit in *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425, 431, certiorari denied, 348 U.S. 833, on grounds which cannot reasonably be disputed. Petitioners' assertion (Pet. 4, 20) that they have received water "by operation of the very irrigation works" referred to in the federal notices of appropriation does not serve to place their lands within the project or to make the federal appropriation for their benefit any more than it would do so to any landowner who happened occasionally to receive a run-off from the federal project. Of course, the very signing of a Warren Act contract acknowledges that the water is to be delivered to non-project lands.

The Warren Act, as the Court of Claims correctly held (Pet. App. 33), authorized contracts "to deliver to nonproject lands only such water as is in excess of the needs from time to time of the project lands." See 46 Cong. Rec. 2782. The Act provides that such

contracts could be made only upon "preserving a first right to lands and entrymen under the project." That means "a first right" to the water appropriated for the project as well as a first right to the carrying capacity of the irrigation works for such appropriated, project water. It can mean nothing else in order to preserve the project rather than to promote peripheral developments at the expense of the project.[6]

The contracts under the Warren Act, pursuant to which water was delivered for use on petitioners' lands, follow the requirements of the Warren Act. Thus, Section 6 of the 1924 and 1951 contracts (Pet. App. 34, 35) provides that only "such water from the project as may be available" will be delivered, that "availability will be dependent upon operating conditions on the project," that the "Secretary of the Interior shall be at all times the sole judge of the availability of such water," and that the "rental of water hereunder is secondary and inferior

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[6] Reliance by the petitioners (Pet. 17-19) on the legislative history of the Warren Act is misplaced. An examination of the entire debate does not support the conclusion which the petitioners would draw from excerpting some of Congressman Reeder's remarks. Whatever doubt might arise from his statement at 46 Cong. Rec. 2781 is eliminated by the clarification presented by Congressman Mondell, Chairman of the House Public Lands Committee, at page 2782:

> "* * * so that the first rights are those under the project, and nothing can be done, nothing is contemplated in this bill, nothing that we could do could take from the project the water necessary for the irrigation of all of the lands under the project."

to the right to use of waters on the Rio Grande Federal Irrigation Project for any purposes." Section 13 (Pet. App. 34, 36) recognizes that due to "drought" or "by reason of the requirements and use on the lands within the Rio Grande Federal Irrigation Project * * * there may be at times an insufficiency of water for District lands * * *." In fact at this very point of the contract it is recognized in express terms that the United States has no liability. Those contractual provisions control this case. They are the sole source and measure of petitioner's rights. As the court below found (Pet. App. 36), " * * * it is not disputed that during the severe drought in Texas this water was needed on project lands. When the drought was broken we understand deliveries of water to District lands were resumed." Petitioners' district plainly agreed to such a procedure. There is nothing in the contract or in the authorizing statute to give them the perpetual right to uninterrupted delivery which they claim. The petition ignores completely these contract provisions. Elimination of contract provisions precisely covering the situation which occurred is essential for petitioners to present an argument at all. There can be no justification for such negation of the contract.

The decisions cited by petitioners relative to the general law of water rights in western states need not be disputed. Their other authorities are not apposite. Thus, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (Pet. 5), dealt with a water right having valid existence under state law prior to the reclamation project. The only language in *Ickes* v. *Fox*,

300 U.S. 82, and *Nebraska* v. *Wyoming*, 325 U.S. 589 (Pet. 11-14), relative to vesting of title to water rights, dealt with lands within the reclamation project for which the Government had expressly appropriated the water.

Contrary to petitioners' contention (Pet. 16-17), the decision below does not violate any general doctrine that a water right must be appurtenant to the land irrigated. The Warren Act and the contract under it in this case by "preserving a first right to lands and entrymen under the project" have made certain, in accordance with the language of petitioners' cited authority (Pet. 9), that the appropriated water shall not be "disassociated from the land to which it is designed to be applied." The real question is not whether petitioners' rights, whatever they may be, are appurtenant to their lands. The question is whether those rights are junior and inferior to the first right to use available project waters on project lands.

CONCLUSION

The decision by the Court of Claims is correct and does not call for review by this Court. There is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

DAVID R. WARNER,
S. BILLINGSLEY HILL,
ALFRED H. O. BOUDREAU, JR.,
Attorneys.

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